

BEFORE THE LAND USE COMMISSION

OF THE STATE OF HAWAII

In the Matter of)	DOCKET NO. SP21-413
)	
CONNECTIONS NEW CENTURY PUBLIC)	ORDER DENYING SPECIAL PERMIT
CHARTER SCHOOL AND COMMUNITY)	SP21-413 CONNECTIONS NEW
BASED EDUCATION SUPPORT SERVICES)	CENTURY PUBLIC CHARTER
)	SCHOOL AND COMMUNITY BASED
Application for Special Permit Application No. 12-)	EDUCATION SUPPORT SERVICES
000138)	BROUGHT BY COUNTY OF
)	HAWAII WINDWARD PLANNING
TMK (3) 2-5-006:141; Kaūmana, South Hilo, Hawai'i)	COMMISSION; CERTIFICATE OF
)	SERVICE
_____)	

ORDER DENYING SPECIAL PERMIT SP21-413 CONNECTIONS NEW CENTURY PUBLIC
CHARTER SCHOOL AND COMMUNITY BASED EDUCATION SUPPORT SERVICES BROUGHT
BY COUNTY OF HAWAII WINDWARD PLANNING COMMISSION;

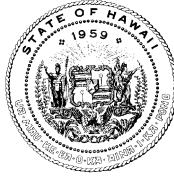
AND

CERTIFICATE OF SERVICE

This is to certify that this is a true and correct
copy of the document on file in the office of the
State Land Use Commission, Honolulu, Hawai'i.

February 18, 2022 by

Executive Officer



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In the Matter of)	DOCKET NO. SP21-413
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CONNECTIONS NEW CENTURY)	ORDER DENYING SPECIAL
PUBLIC CHARTER SCHOOL AND)	PERMIT SP21-413 CONNECTIONS
COMMUNITY BASED EDUCATION)	NEW CENTURY PUBLIC CHARTER
SUPPORT SERVICES)	SCHOOL AND COMMUNITY
)	BASED EDUCATION SUPPORT
Application for Special Permit Application No.)	SERVICES BROUGHT BY COUNTY
12-000138)	OF HAWAII WINDWARD
)	PLANNING COMMISSION
TMK (3) 2-5-006:141; Kaūmana, South Hilo,)	
Hawai'i)	
)	
)	

ORDER DENYING SPECIAL PERMIT SP21-413 CONNECTIONS NEW CENTURY PUBLIC
CHARTER SCHOOL AND COMMUNITY BASED EDUCATION SUPPORT SERVICES
BROUGHT BY COUNTY OF HAWAII WINDWARD PLANNING COMMISSION:

This matter involves an application filed by Connections New Century Charter School (“Connections”) for a special permit, pursuant to section 205-6, Hawaii Revised Statutes (“HRS”), to allow the development of a charter school campus with dorm facilities and related improvements for students in kindergarten through twelfth grade within the agricultural district.

Under section 205-6, HRS, the planning commission of each county may permit certain unusual and reasonable uses within agricultural and rural district other than those for which the district is classified. HRS § 205-6(a). If the land for which the special permit is sought is greater than fifteen acres, or for lands designated as important agricultural lands, the special permit shall be subject to approval by the Land Use Commission (“LUC”). HRS § 205-6(d). A copy of the decision, together with the complete record of the proceeding before the county planning commission, shall be transmitted to the LUC within sixty days after the decision is rendered. HRS § 205-6(e). Thereafter the LUC has forty-five

days to approve, approve with modification, or deny the petition. *Id.* A denial by the county planning commission or the LUC, or a modification by the land use commission, are appealable to the circuit court. *Id.*

The State of Hawaiʻi Land Use Commission (“LUC”) having duly considered the entire record in the above-entitled matter, makes the following findings of fact, conclusions of law and decision and order.

I. PROCEDURAL HISTORY

1. On July 25, 2012, Connections and Community Based Support Services (“CBESS”) (hereinafter collectively referred to as the “Applicants”) filed an application for a special permit (“SPP-12-000138”), pursuant to section 205-6, HRS and Rule 6 of the County of Hawaiʻi Planning Commission Rules of Practice and Procedure (“Commission Rules”), to allow the development of a charter school campus and related improvements for students in kindergarten through twelfth grade (the “Development”), on 70.15 acres of land situated within the State Land Use Agricultural District, at Ponahawai, Kūkūau 2nd, South Hilo, Hawaiʻi, commonly referred to as the “Kaūmana” area, Tax Map Key (“TMK”) (3) 2-5-006:141 (the “Property”). *County of Hawaii Windward Planning Commission’s Findings of Fact, Conclusions of Law and Decision and Order*, dated November 4, 2021, pgs. 1-2, FOF ¶ 1.¹

2. Public Hearings on SPP 12-000138 were scheduled and notices were provided to interested parties. PC D&O pg. 1, FOF ¶2.

3. The Hawaiʻi County Windward Planning Commission (“Commission”) initially held public hearings on SPP 12-000138 on November 9, 2012, December 6, 2012, and January 10, 2013. PC D&O pg. 1, FOF ¶ 3.

4. On November 9, 2012, Connections, its experts, and interested surrounding property

¹ Hereafter the *County of Hawaii Windward Planning Commission’s Findings of Fact, Conclusions of Law and Decision and Order*, dated November 4, 2021, which is included in the record as Exhibit 114, will be cited as “PC D&O” with a citation to the page number and paragraph number.

owners provided testimony and evidence. No requests for a contested case were made. The Commission and Applicants believed that there was not an option for a contested case because the LUC would make the final decision to approve or deny SPP 12-000138. The Commission and Applicants agreed to delay the vote on SPP 12-000138 to conduct further discussion on traffic and other concerns raised about the application. PC D&O pg. 1, FOF ¶ 4.

5. On December 6, 2012, Connections produced additional information and requested a continuance because the State of Hawai‘i Department of the Attorney General was taking over as Connections legal representation. The Commission granted Connections’ request for a continuance. PC D&O pgs. 1-2, FOF ¶ 5.

6. On January 10, 2013, the Commission moved to deny SPP 12-00138. However, no vote was held because members of the Commission were absent. The Commission also instructed the Hawai‘i County Planning Department (“Planning Department”) and Deputy Corporation Counsel of the Commission to draft proposed findings of fact, conclusions of law for denial of SPP 12-000138 for consideration at the Commission’s March 7, 2013, meeting. PC D&O pg. 2, FOF ¶ 6.

7. On February 15, 2013, the Planning Department mailed out a notice of public hearing to the surrounding property owners, which included notice of the right to file for intervention in contested case and a petition for standing to intervene in a contested case. Thus, the Planning Department suspended drafting the proposed findings of fact, and conclusions of law. PC D&O pg. 2, FOF ¶ 7.

8. On March 7, 2013, due to concerns raised about contested case procedures, the Commission withdrew its motion to deny SPP 12-000138 and granted a request by Connections for a contested case hearing. The Commission also granted standing to Intervenor Jeffrey Gomes (“Gomes”) and voted to retain a hearing officer to conduct the contested case hearing. PC D&O pg. 2, FOF ¶ 8.

9. Retired Judge Sandra Petcher Song was retained as the contested case hearing officer (“Hearing Officer”). The contested case hearing was held over five days on October 21, 2013, October 22, 2013, November 12, 2013, January 8, 2014, and January 22, 2014. PC D&O pg. 2, FOF ¶ 9.

10. On April 7, 2014, the Hearing Officer submitted her report to the Commission and the

Parties. The report concluded that SPP 12-000138 should be denied. The Applicants submitted joint exceptions to the Hearing Officer's report . The Planning Department also submitted exceptions to the Hearing Officer's report. PC D&O pgs. 2-3, FOF ¶ 10.

11. On May 1, 2014, the Commission voted to uphold the Hearing Officer's recommendation and to deny SPP 12-000138. PC D&O pg. 2, FOF ¶ 11.

12. On May 19, 2014, the Commission issued its final Findings of Fact, Conclusions of Law, Decisions and Order ("Commission D&O"). PC D&O pg. 2, FOF ¶ 12.

13. On June 9, 2014, and June 19, 2014, CBESS and Connections, respectively, filed timely notices of appeal of the Commission D&O in the State of Hawai'i Third Circuit Court ("Circuit Court"). PC D&O pg. 3, FOF ¶ 13.

14. After hearing arguments on the matter, the Circuit Court issued a Decision and Order affirming the Commission's decision on July 14, 2015. PC D&O pg. 3, FOF ¶ 14.

15. On January 13, 2017, the Circuit Court entered in its Second Amended Final Judgment in favor of the Commission, Intervenor Gomes, the Planning Department, and the Hearing Officer. PC D&O pg. 3, FOF ¶ 15.

16. On January 21, 2017, Connections filed a timely notice of appeal to the State of Hawai'i Intermediate Court of Appeals ("ICA"). PC D&O pg. 3, FOF ¶ 16.

17. On January 31, 2020, the ICA issued a Memorandum Opinion vacating the Circuit Court's July 14, 2015 Order and January 13, 2017 Final Judgment and the May 19, 2014 Commission D&O, and remanded the case back to the Commission for further proceedings consistent with its Memorandum Opinion.² PC D&O pg. 3, FOF ¶ 17.

18. On July 6, 2021, the Commission via a letter from the Commission Chair requested that the parties provide brief the Commission on "[w]hether the Commission should make a decision on the

² *Connections New Century Public Charter School v. Windward Planning Commission, County of Hawaii*, CAAP Nos. 17-000050, 16-0000813, and 16-0000879 (Consolidated), Memorandum Opinion, Jan. 31, 2020, (Bates no. 131278, et seq.) ("ICA Decision").

record as presented or open the record and consider new evidence?” PC D&O pg. 3, FOF ¶ 18.

19. July 30, 2021, the Commission received briefs from CBESS, Intervenor Gomes, and the Planning Department. Connections submitted a letter joining CBESS’s brief. PC D&O pg. 4, FOF ¶ 19.

20. On August 5, 2021, the Commission voted to decide on the record as presented and continue the hearing to the Commission’s October 7, 2021 meeting to allow time to review the voluminous record. PC D&O pg. 4, FOF ¶ 20.

21. On October 7, 2021, after reviewing the entire record on appeal, and hearing public testimony and presentations by the Parties, the Commission voted to approve SPP 12- 000138 based on the Planning Director’s October 31, 2012 revised recommendation with conditions (“PD’s Recommendation”), which was adopted. PC D&O pg. 4, FOF ¶ 21.

22. On November 4, 2021, the Commission issued its Findings of Fact, Conclusions of Law, and Decision and Order. PC D&O.

23. On December 28, 2021, the LUC received a Notice of Appearance of Gomes’ Attorney, Michael Matsukawa.

24. On January 4, 2022, the LUC received Connections’ Notice of Representation by Deputy Attorney General Kevin M. Richardson

25. On January 7, 2022, the LUC mailed the Agenda Notice for the January 19-20, 2022 meeting to the Parties, statewide and county lists.

26. On January 10, 2022, the LUC received the Planning Department’s Notice of Representation by Deputy Corporation Counsel Jean Campbell.

27. On January 11, 2022, the LUC received the Commission’s Notice of Representation by Deputy Corporation Counsel Malia Kekai and public testimony from Linda Pexa.

28. On January 20, 2021, the LUC met via ZOOM virtual interactive conferencing technology in Hawai`i, to consider and deliberate on SPP 12-000138, pursuant to HRS § 205-6, and LUC Hawaii Administrative Rules chapter 15, subchapter 12, to allow the Development, on the Property.

29. At the hearing Kevin Richardson, Esq., and Romeo Garcia, appeared on behalf of the

Applicant- Department of Education (“DOE”); Ted Hong, Esq., and John Thatcher, appeared on behalf of CBESS; Malia Kekai, Esq. appeared on behalf of the Commission, Jean Campbell, Esq. and Jeff Darrow, also appeared on behalf of the County of Hawaii Planning Department; Michael Matsukawa, Esq. appeared on behalf of Intervenor Gomes; and Alison Kato, Esq., and Rodney Funakoshi appeared on behalf of the State Office of Planning and Sustainable Development (“OPSD”).

30. At the meeting, the LUC heard public testimony in opposition to SP 12-000318 from Ming Peng, Nelyn Ang, Henry K. Lee Loy, Jeffery Gomes, and Anna Kennedy; and public testimony in favor of SPP 12-000138 from Sadira Kirkham and Krysa Costa.

31. Following the receipt of public testimony, the parties provided oral argument on whether SPP 12-000138 should be granted and what options were available to the LUC in this matter and fielded questions from the Commission after their respective turns at making their presentations. Connections’ Representatives, Mr. Richardson, Esq. and Mr. Garcia, provided a background history of the Connections Charter School and its role in the community, and described the efforts that had been expended by Connections to move the proposed project through the special permit process at the County level.

32. CBESS’ Representatives, Ted Hong, Esq., and John Thatcher described how CBESS was involved with the proposed project and had participated in the development efforts of obtaining the project site from the Department of Land and Natural Resources (“DLNR”) and argued that the Commission should take judicial notice of the Decision and Order for Docket No. SP00-393 Kamehameha Schools Kea`au Campus during its consideration of this docket matter and while deciding to grant the Petition. Discussion ensued and Chair Scheuer decided that the judicial notice issue would be addressed if an argument arose over whether a Special Permit (“SP”) or District Boundary Amendment (“DBA”) should be pursued during proceedings later. Mr. Hong did not object to this and did not later seek to have judicial notice taken of the above docket.

33. Following the proceedings, a motion was made and seconded to deny Special Permit No. SP21-413 and received the affirmative votes required by Hawaii Administrative Rules (“HAR”) § 15-15-13 (6 ayes, 0 nays, 2 recused- Commissioners Cabral and Okuda- 8 Commissioners seated), and there

being good cause for the motion.

II. COUNTY OF HAWAII - WINDWARD PLANNING COMMISSION'S FINDINGS OF FACT

The following findings of fact from the County of Hawaii Windward Planning Commission's Findings of Fact, Conclusions of Law, and Decision and Order dated November 4, 2021, in SPP No. 12-000138 are hereby adopted by the LUC and incorporated in this decision.

A. THE PROPOSED DEVELOPMENT

1. DESCRIPTION OF PROPOSED USE

34. SPP 12-000138 generally proposes the development of a K to 12 charter school campus with dorm facilities, and an intergenerational program that would provide childcare and elder care at a single facility on the Property, together with related uses on the 70-acre parcel of land. As the site is bisected by Edita Street, the lower portion of the Development would consist of the major school or campus facilities, while the upper portion would be used for outdoor educational programs, including a forestry preservation program. There is no specificity in the proposed project and only conceptual plans are available. PC D&O pg 4, ¶ 22.

35. Conceptually, the lower campus would support a projected 167 elementary students, 107 intermediate students, 107 high school students (381 K through 12 students) and 25 intergenerational clients. Also included would be a dormitory capable of supporting 30 students, a gymnasium, kitchen/dining facility, library/resource center, caretaker's residence, and other related facilities. Two parking lots with a total of 140 parking stalls would be provided. PC D&O pg 4, ¶ 23.

36. The Development proposes to relocate and expand the existing charter school which is presently operating from two separate campuses. The elementary and middle schools are in the Kress Building on Kamehameha Avenue, in downtown Hilo, and the high school is in leased facilities at the Nani Mau Gardens, just outside of Hilo town. PC D&O pg 4, ¶ 24.

37. Connections proposes having 50 full-time and 17 part-time employees at full buildout of the Development, which is the same number presently employed for this charter school. PC D&O pg 4, ¶ 25.

38. The Development will purportedly be constructed in 9 phases and completed within 16 to 25 years. The first phase would include the caretaker's residence, high school, and administration building, with the projected opening to be within 2.5 to 3.5 years. PC D&O pg 4, ¶ 26.

2. PUBLIC UTILITIES AND SERVICES

a. Access

39. The planned access to the Development is proposed from Edita Street which connects with Kaūmana Drive. Both roads are owned and maintained by the County of Hawai'i. Edita Street has a 60-foot right-of-way width, with a 48-foot-wide pavement width fronting the Development. The paved area accommodates two 20-foot-wide travel lanes, a 20-foot-wide shoulder on the northeast side of the road, and an 8-foot-wide shoulder on the Southwest side. Edita Street is in good condition. PC D&O pg 5, ¶ 27.

40. Based on the proposed plan, the Hawai'i County Police Department ("HPD") recommended that the unpaved shoulder along Edita Street extending from Kaūmana Drive to the Development should be paved so that pedestrians could safely walk along the shoulder. Based on the proposed plan, the Applicants have agreed to follow HPD's recommendation. PC D&O pg 5, ¶ 28.

41. The Planning Department's Recommendation condition 8 states, "[t]he applicant shall construct an 8 foot paved shoulder along the northeastern (Makai) side of Edita street from the south end of the subject property to the intersection of Edita Street and Kaūmana Drive (Standard Detail R-34) meeting with the approval of the Department of Public Works." PC D&O pg 6, ¶ 30.

b. Traffic

42. A Traffic Impact Analysis Report ("TIAR") dated June 28, 2010, was prepared in conjunction with the Connections application for the purpose of evaluating the Development's impact at the Development's entrance at Edita Street and at the Edita and Kaūmana Drive intersection. Based upon traffic counts taken on May 28, 2009, the TIAR found that the current level of service ("LOS") operates as LOS "A" or "B", meaning that the traffic service is uncongested. The TIAR also concluded that upon full build-out of the Development, the LOS will continue to operate at levels "A" or "B". The TIAR has

not been updated since 2010, almost 12 years ago and does not take into account current conditions. PC D&O pg 6, ¶ 31.

43. In response to the 2010 TIAR, the Hawai‘i County Department of Public Works (“DPW”) recommended that a separate left turn lane onto the Development from Edita Street should be constructed to alleviate congestion, and that Connections should prepare a comprehensive traffic management plan for the Development. PC D&O pg 6, ¶ 32.

44. In response to the 2010 TIAR, Applicants agreed to mitigate and minimize potential traffic impacts by following DPW’s recommendations. PC D&O pg 6, ¶ 33.

45. In response to the 2010 TIAR, PD’s Recommendation condition 7 stated, “[t]he applicant shall construct a separate turn lane for left turns from eastbound Edita Street into Lower Campus at Road A meeting with the approval of the Department of Public Works.” PC D&O pg 6, ¶ 34.

46. In response to the 2010 TIAR, the Planning Department’s Recommendation condition 9 stated:

[t]he applicant shall submit a Traffic Management Plan to be reviewed and approved by the Department of Public Works-Traffic Division in consultation with the Police Department. The comprehensive plan shall be implemented and provide traffic management strategies that reduce traffic congestion on surrounding County roads during special events and student pick-up/drop-off activities for the entire school campus. The applicant shall provide active traffic management of all student pick-up/drop-off areas so that drop-off and pick-up activity does not result in queuing of vehicles on any County Road. The applicant shall incorporate carpooling, bus and van services, and staggering school pick-up and drop-off times.

PC D&O pgs 6-7, ¶ 35.

47. Based on the 2010 TIAR, the Planning Department’s Recommendation Condition 10 stated, “[t]he applicant shall design project driveways/roads, parking and loading areas so all school traffic and congestion is confined to the project site.” PC D&O pg 7, ¶ 36.

c. Water

48. The Property has access to County of Hawai‘i water up to a maximum daily usage of 4,200 gallons per day ("gpd") of water or seven (7) water units (600 gpd per unit) from an existing 8-inch

waterline on Kaūmana Drive for the upper campus and from an existing 8-inch waterline on Edita Street for the lower campus to service the entire Development. PC D&O pg 7, ¶ 37.

49. The existing 8-inch waterline within Edita Street is looped to provide the required 2,000 gallons of water per minute for fire protection for the proposed Development. This requirement is based on the Hawai‘i County Department of Water Supply’s (“DWS”) water system standards for schools. PC D&O pg 7, ¶ 38.

50. The projected Potable water needs are estimated to be met by connecting to the existing county water supply infrastructure. PC D&O pg 7, ¶ 39.

51. The Applicants have also proposed to meet non-potable water supply needs by developing an undefined extensive rainwater collection system consisting of catchment tanks, storage reservoirs/tanks with a network of water lines to distribute collected water throughout the campus and/or by developing an additional water source. PC D&O pg 7, ¶ 40.

52. Per the Planning Department’s recommendation condition 2, the Applicants agreed to submit anticipated maximum daily water usage and a water commitment deposit to the DWS within 180 days after the effective date of this permit. The calculations must include the estimated peak flow in gallons per minute and total estimated maximum potable water demand in gallons per day. PC D&O pg 8, ¶ 41.

d. Wastewater

53. The Planning Department’s Recommendation condition 13 states, “[t]he method of sewage disposal shall meet with the requirements of the [State of Hawai‘i] Department of Health” (“DOH”). PC D&O pg 8, ¶ 42.

54. Connections is proposing to provide its own unspecified wastewater system meeting the requirements of the DOH. Connections prefers installing an ecological/biological wastewater system called the "Living Machine." However, if such a system proves to be unfeasible, Connections will install a traditional septic system with leach fields, or any other system required by the DOH. PC D&O pg 8, ¶ 43.

e. Drainage

55. The Property is located within Zone "X" on the U.S. Department of Army Corps of Engineers Flood Insurance Rate Map, which means that the Property is outside the 500- year flood plain. Notwithstanding this flood designation, during severe storms water has been known to overtop the concrete channel and flow across Edita Street, resulting in flooding of adjacent properties. Connections proposes to develop solutions by preparing detailed engineering studies for the purpose of developing appropriate drainage plans to address the potential flood hazard posed by the present condition of Edita Street. PC D&O pg 8, ¶ 44.

f. Electric/Phone

56. Electrical and telephone services are available to the Property through overhead lines along Edita Street and Kaūmana Drive. PC D&O pg 9, ¶ 45.

g. Public Safety

57. The HPD expressed concern that the Development would increase noise, crime, and traffic. There is no evidence to support the contention that HPD will be able to provide police protection for the Development. PC D&O pg 9, ¶ 46.

3. PHYSICAL CHARACTERISTICS OF THE PROPERTY AND SURROUNDING AREAS

58. The Property is presently vacant and undeveloped. PC D&O pg 9, ¶ 47.

59. Surrounding lands to the south and west of the Property are zoned A-1a, with properties further south being zoned A-20a and A-10a. Properties to the north of the Property are zoned RS-10 and RS-15, with some lands zoned A-3a further north across Kaūmana Drive. One parcel is also zoned OPEN adjoining the northeast corner of the lower portion of the Property. Surrounding uses consist mainly of single-family residences with some vacant lands, and a small percentage of agricultural activity. PC D&O pg 9, ¶ 48.

60. The soils on the Property are primarily composed of pahoe-hoe lava flow. The Agriculture Lands of Importance to the State of Hawai‘i map designates the property as unclassified. Also, the Land

Study Bureau classifies the soil on the Property under its detailed land classification system, as "D" or "Poor" for agricultural activity. PC D&O pg 9, ¶ 49.

61. Based on an archaeological assessment performed in 2008 by Pacific Legacy, Inc. Research, no archaeologic sites have been found on the Property, and it was surmised that any pre-existing sites would have been destroyed by the lava flow of 1880-1881. PC D&O pg 9, ¶ 50.

62. A portion of the Kaūmana Cave is accessible from the upper portion of the Property. Connections has agreed, per the Planning Department's Recommendation condition 5, to maintain a minimum 100-foot buffer along the cave's entire perimeter within the Property to alleviate concerns about impact from the Development on the cave's ecosystem. No use, structures or land alteration activities shall be permitted within this Kaūmana cave preservation buffer. PC D&O pg 10, ¶ 51.

63. The February 23, 2009 Biological Report- botanical survey of the Property identified 11 native plant species, but none of those species were considered protected species at that time. PC D&O pg 10, ¶ 52.

64. The February 23, 2009 Biological Report -Invertebrate, mammalian and field surveys were conducted on the Property. No protected species were documented to be present on the Property during that time. PC D&O pg 10, ¶ 53.

65. The Commission did not find any traditional or customary native Hawaiian rights had been identified as exercised on the Property. Likewise, there is no known public access to the mountains or the shoreline that runs through the Property. PC D&O pg. 10, ¶ 54.

4. STATE AND COUNTY PLANS

66. The Property is within the State Land Use Agricultural District. A school is not a permitted use within the Agricultural district; however, a school may be permitted in this district if a special permit is obtained for such use pursuant to Section 205-6, HRS and Rule 6 of the Commission Rules. PC D&O pg. 10, ¶55.

67. The County of Hawai'i General Plan Land Use Pattern Allocation Guide("LUPAG") Map designated the Property for low density urban uses. The LUPAG designation of Low-Density urban

use, allows for residential uses, with ancillary community and public uses, and neighborhood and convenience-type commercial uses. PC D&O pg. 10, ¶56.

68. The County of Hawai‘i zoning for the Property is Agricultural with a minimum lot size of one acre (A-1a). Under Section 25-5-72(d) of the Hawai‘i County Code. Schools are listed as a permitted use provided that it meets the requirement for a special permit if the land is within the State Land Use Agricultural District. PC D&O pg. 10, ¶58.

69. The Development, which will be located on State land, is subject to the Hawai‘i State Environmental Impact Statement law, Chapter 343, Hawai‘i Revised Statute (“HRS”). Connections prepared an environment assessment in accordance with HRS Chapter 343, and a declaration with a finding of no significant impact was issued for the Development by the State of Hawai‘i Department of Land and Natural Resources. State of Hawai‘i leased the land to Connections for sixty-five (65) years under General Lease No. S-6029. PC D&O pg. 11, ¶59.

70. The Property is not situated within the Special Management Area ("SMA") since it is located over three miles from the nearest shoreline. Thus, the coastal environmental considerations relating to the SMA are not applicable to the subject Property. PC D&O pg. 11, ¶60.

5. SPECIAL PERMIT REQUIREMENTS

71. For an applicant to file an application for a special permit, it must comply with Commission’s Rule 6-3(b)(5)(A) through (G).

72. Planning Commission Rule 6-3(b)(5)(A) through (G) provides that:

- A. Such use shall not be contrary to the objectives sought to be accomplished by the Land Use Law and Regulations;
- B. The desired use shall not adversely affect surrounding properties;
- C. Such use shall not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage, school improvements, and police and fire protection;
- D. Unusual conditions, trends and needs have arisen since the district boundaries and regulations were established;

- E. The land upon which the proposed use is sought is unsuited for the uses permitted within the district;
- F. The proposed use will not substantially alter or change the essential character of the land and the present use; and
- G. The request will not be contrary to the General Plan and official Community Development Plan and other documents such as Design plans.

PC D&O pg. 12, ¶ 62.

73. Commission Rule 6-7, provides, in the relevant part, that:

The Commission shall not approve a Special Permit unless it is found that the proposed use:

- (a) Is an unusual and reasonable use of land situated within the Agricultural... District...; and
- (b) Would promote the effectiveness and objectives of Chapter 205, Hawai'i Revised Statutes, as amended.

The Commission shall also consider the criteria listed under Section 6-3(b)(5)(A) through (G).

PC D&O pg. 12, ¶ 62.

74. HRS Section 205-6, which governs special permits provides, in the relevant part, as follows:

(a) The county planning commission may permit certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified. Any person who desires to use the person's land within an agricultural...district other than for an agricultural...use...may petition the planning commission of the county within which the person's land is located for permission to use the person's land in the manner desired.

...

(c) The county planning commission may, under such protective restrictions as may be deemed necessary, permit the desired use, but only when the use would promote the effectiveness and objectives of this chapter.

...

(d) Special permits for land the area of which is greater than fifteen acres ... shall be subject to approval by the land use commission.

The land use commission may impose additional restrictions as may be necessary or appropriate in granting the approval including the adherence to representations made by the applicant.

PC D&O pgs. 11-12, ¶61.

6. CONFORMANCE WITH SPECIAL PERMIT CRITERIA

75. The Commission found that the proposed Development met the criteria for an “unusual and reasonable” use as defined by Commission Rule 6-3(b)(5) and HAR Section 15-15-95(b) as follows:

76. The Commission recognized that State Land Use Law and Regulations are intended to preserve, protect and encourage the development of lands from those uses to which they are best suited in the interest of the public welfare of the people of the State of Hawai‘i. Within the Agricultural District, the intent is to preserve or keep lands of high agricultural potential for agricultural use. PC D&O pg. 13, ¶ 65.A.

77. The Commission noted that the land upon which the proposed use it sought is unsuited for agricultural uses. However, the Applicants are proposing to have agricultural programs on the lower campus. PC D&O pgs. 13-14, ¶ 65.A.

a. Affect on Surrounding Properties

78. Surrounding lands to the south and west of the Property are zoned A-1a, with properties further south being zoned A-20a and A-10a. Properties to the north of the Property are zoned RS-10 and RS-15, with some lands zoned A-3a further north across Kaūmana Drive. One parcel is also zoned OPEN adjoining the northeast corner of the lower portion of the Property. PC D&O pg. 14, ¶ 65.B.

79. Surrounding uses consist mainly of single-family residences with some vacant lands, and a small percentage of agricultural activity. The nearest dwellings to the upper parcel are located on adjoining properties to the north along Kaūmana Drive and to the south along Mele Manu Street. The nearest dwellings to the lower parcel where most facilities will be located to the north along Edita Street and Kaūmana Drive. PC D&O pg. 14, ¶ 65.B.

80. Based upon the testimony from surrounding and neighboring property owners, the Development will have an adverse effect on surrounding properties by creating noise, traffic, and

impacting the quality of life of the adjoining residents. The Applicants propose multiple conditions to mitigate and minimize the potential adverse effects the Development could create for the surrounding properties. Connections are also required, per PD's Recommendation condition 4, to create a landscaping buffer along the entire 70-acre project site to eliminate or minimize "noise, dust, litter, glare of lights, signs or unsightly areas between adjacent land uses or between a land use and roadway." Planning Department Rule No. 17 (Landscaping Requirements). PC D&O pg. 14, ¶ 65.B.

b. Whether the Use Unreasonably Burdens Public Agencies to Provide Roads and Streets, Sewers, Water, Drainage, School Improvements, and Police and Fire Protection.

81. The Development's primary access will be via Edita Street, which extends from Kaūmana Drive. The Applicant's 2010 traffic impact analysis report for the Development indicates that at full build-out the level of service will be "A" or "B". The 2010 TIAR did indicate school related vehicles turning left into the campus will cause delays to through traffic along Edita Street unless a separate turn lane is provided. The Applicants are required to construct a separate turn lane to address this potential impact to traffic. PC D&O pg. 15, ¶ 65.C..

82. Hawai'i County Department of Public Works ("DPW") recommended that a separate left turn lane onto the Development from Edita Street should be constructed to alleviate congestion, and that Connections should prepare a comprehensive traffic management plan for the Development. PC D&O pg. 15, ¶ 65.C.

83. There is no municipal sewer system available at the Property. The Applicants propose to provide an unspecified wastewater system that will meet the DOH's requirements. PC D&O pg. 15, ¶ 65.C.

84. County water service is expected to be available from an 8-inch water line on Kaūmana Drive for the upper campus and from an 8-inch water line on Edita Street for the Lower campus. PC D&O pg. 15, ¶ 65.C.

85. The Applicants are required to dispose of all Development related run-off onsite. PC D&O pg. 15, ¶ 65.C.

86. Both police and fire are located relatively close to the proposed Development. PC D&O pg. 15, ¶ 65.C.

87. Electricity, water and wastewater disposal facilities and other essential services are or will be available for the proposed school and related improvements. PC D&O pg. 15, ¶ 65.C.

c. Whether Unusual Conditions, Trends and Needs Have Arisen Since the District Boundaries and Rules Were Established.

88. The Commission found that the area in which the Property is located has essentially become residential in character and that the County General Plan LUPAG map recognizes this trend by designating the area for low density urban use. PC D&O pg. 15, ¶ 65.D.

89. Connections currently operates two campuses one at the Kress Building, Downtown Hilo and at Nani Mau Gardens Facility. PC D&O pg. 15, ¶ 65.D.

d. Whether the Land Upon Which the Proposed Use is Sought is Unsited for the Uses Permitted the District.

90. The Land Study Bureau Detailed Land Classification System (with “A” being the best and “E” being the worst) classifies the soil, which mainly consists of pahoehoe lava as "D" or "Poor" for agricultural activity. The land on which the proposed use if located is “Unclassified” by Agriculture Lands of Importance to the State of Hawai‘i (“ALISH”) System. PC D&O pg. 16, ¶ 65.E.

91. As mentioned above, although the land is unsited for agricultural uses, Connections is proposing to maintain the upper portion or nearly one-half of the Property for forestry use, and to construct greenhouses and conduct an agricultural program in conjunction with its curriculum on the lower campus. PC D&O pg. 16, ¶ 65.D.

e. Whether the Proposed Use Will Not Substantially Alter or Change the Essential Character of the Land and Present Use

92. The current character and present use of the subject property is undeveloped, vacant of structures and uses. The current character of the surrounding area is residential and agricultural. The present use of the area is mainly residential with some agricultural activity and vacant land. The Applicants have proposed to construct buildings as single-story structures, like the surrounding residential

community. PC D&O pg. 16, ¶ 65.F.

f. Whether the Request is Contrary to the General Plan and Official Community Development Plan and Other Design Plans

93. The Economic, Public Facilities and Land Use elements of the County General Plan all require consideration of social and community concerns as follows:

Economic Element – Goal

- Provide an economic environment that allows new, expanded, or improved economic opportunities that are compatible with the County's cultural, natural, and social environment.
- Provide residents with opportunities to improve quality of life through economic development that enhances the County's natural and social environments.

Public Facilities-Education (Course of Actions for South Hilo)

- Encourage the establishment of additional schools as need arises.
- Encourage the Provision of public facilities that effectively service the community and visitor needs and seek ways of improving public service through better and more functional facilities in keeping with the environmental and aesthetic concerns of the community.

Land Use-Public Lands

- "Encourage uses of public lands that will satisfy specific public needs, such as housing, recreation, open space and education.

PC D&O pg. 16-17, ¶ 65.G.

7. THE PUBLIC TRUST DOCTRINE

94. The “Public Trust Doctrine” protects forests, water resources and prime agricultural lands from unnecessary urbanization. *Kauai Springs, Inc. v. Planning Comm’n of Cnty. Of Kauai*, 130 Hawai‘i 407, 426, 312 P.3D 283, 299 (Ct. App. 2013) cert, granted sub nom. *Kauai Springs, Inc. v. Planning Comm’n of Cnty. of Kaua‘i*, No. SCWC 29440, 2013 WL 4779589 (Haw. Sept. 4, 2013) and aff’d, 133 Haw. 141, 324 P.3d 951 (2014). PC D&O pg. 17, ¶ 66.

95. The Property is not classified as “important” by State Department of Agriculture, but instead, classified as “D” or “Poor” for agricultural activity by the State Land Study, Bureau. PC D&O

pg. 17, ¶ 66.

III. OFFICE OF PLANNING AND SUSTAINABLE DEVELOPMENT (“OPSD”) POSITION

96. The OPSD submitted a recommendation of approval dated January 18, 2022 in which OPSD recommended approval of SP 12-000318 subject to conditions.

A. Special Permit Guidelines

97. OPSD’s recommendation assessed the proposed Project relative to the Special Permit guidelines set forth in Hawaii Administrative Rules § 15-15-95 which allows certain “unusual and reasonable” uses within the Agricultural and Rural Districts other than those for which the district is classified. OPSD Recommendation, dated January 18, 2022, pg. 3.³

1. The use shall not be contrary to the objectives sought to be accomplished by Chapters 205 and 205A, HRS and the rules of the LUC,

98. Chapter 205, HRS seeks to protect agricultural lands and ensure their continued availability for agricultural use. It provides that the Agricultural District shall include lands with a high capacity for agricultural production, grazing, or other agricultural uses. Chapter 205 also recognizes, however, that some lands in the Agricultural District may not be suitable for the uses permitted in the Agricultural District and, therefore, other uses may be allowed with a Special Permit. OPSD Rec. pg. 3.

99. The property is undeveloped with no existing uses or structures located on the site. The site is located on the 1880-1881 lava flow. Soils are rated as pahoe-hoe lava flow. The Property is not classified on the ALISH map. The soil is rated as “D” or “poor” by the Land Study Bureau (“LSB”). Opsd Rec. pg 3.

2. The desired use would not adversely affect surrounding property.

100. There are single family residential uses and vacant lands within the surrounding area with the nearest residential dwellings located to the north along Edita Street and Kaūmana Drive to the lower parcel. The Revised Recommendation indicates that the proposed use may adversely impact the

³ The OPSD Recommendation shall be referenced as “OPSD Rec” with a reference to the page number of the recommendation.

surrounding area from increased traffic using unspecified mitigation. OPSD Rec. pg. 4.

3. The use would not unreasonably burden public agencies to provide streets, sewers, water, drainage, schools, fire, and police resources.

101. The County would supply potable water up to a maximum daily usage of 4, 200 gallons per day and that non-potable water would be provided with an unspecified rainwater catchment system on site. The Project is located outside of the 500-year flood plain. Connections is required to implement various measures to mitigate adverse impacts on traffic from the proposed school use. OPSD Rec. pg 4.

4. Unusual conditions, trends, and needs have arisen since the district boundaries and rules were established.

102. The surrounding area had developed into low-density residential neighborhoods with the County plans allowing low-density urban uses which extended from nearby Hilo Town. OPSD Rec. pg. 5.

5. The land upon which the proposed use is sought is unsuited for the uses permitted within the district.

103. The Petition Area is low-quality agricultural and assumes that the Petitioner will establish agricultural and reforestation programs as part of the school curriculum. OPSD Rec. pg. 5.

B. State Issues and Concerns

104. OPSD's Comments on State Issues and Concerns covered the topics of Archaeological Resources, the Kaūmana Cave, Coastal Zone Management and Sustainability. OPSD Rec. pgs. 5-6.

105. The archaeological resources and Kaūmana cave both concern the cave system. Although the Kaūmana cave runs below portions of both the lower and upper parcels, it is believed to be inaccessible under the lower parcel. The cave ecosystem is described by Dr. Fred Stone in 1992 for the Puainako Street Extension and Widening Project EIS, and a survey found that the cave ecosystem depended on the Ohia tree roots that grow into the Kaūmana cave system. The upper parcel contains a portion of the Kaūmana cave and an Ohia tree forest. Proposed mitigation will includes a 100 foot buffer surrounding the case on both the upper and lower parcels, verifying the cave alignment prior to any construction, and if a portion of the cave is found during construction, all construction activity in the area must cease immediately and the proper authorities contacted, including SHPD, to assess the lava tube and

its contents.

106. OPSD acknowledged that the Petition Area is not within the Special Management Area and that according to the Hawaii 2050 Sustainability Plan, the Petitioner's proposal for a reforestation program and protection of natural resources meets strategy 35, Protect and manage watersheds, and Strategy 37 to conserve working forest landscapes, protect forests from harm, and enhance public benefits from trees and forests.

C. OPSD's RECOMMENDATION

107. OPSD recommended approval of the State Special Permit but noted that although the Commission described various concerns within its D&O, and referenced adopting the conditions within the Counties [sic] Exhibit 78, the Commission did not specify the 19 conditions in its Decision and Order. OPSD recommended that the LUC incorporate the conditions from the Revised Recommendation dated October 31, 2012.

108. OPSD recommends one additional condition be imposed to address endangered species as recommended in the FONSI:

Fish and Wildlife Protection. Petitioner shall comply with the following:

- (a) The State listed Hawaiian Hawk ('io). To avoid impacts to the Hawaiian Hawk, prior to any construction and/or tree harvesting activities, the area should be surveyed during the breeding season from March to September to ensure no Hawaiian Hawk nests are present if trees are to be cut. If this cannot be avoided, no trees should be disturbed, removed or trimmed without consulting Department of Land and Natural Resources, Division of Forestry and Wildlife (DOFAW).
- (b) To avoid potential impacts to the Hawaiian hoary bat, the clearing of dense vegetation, including woody plants greater than 15 feet should not occur between June 1 to September 15 when bats may be carrying young and potentially at risk by such clearing activities. If this cannot be avoided, woody plants greater than 15 feet tall should not be disturbed, removed, or trimmed without consulting DOFAW. Barbed wire shall not be installed on fencing within the Petition Area.

IV. LUC FINDINGS OF FACT

109. The ICA Decision vacated the decision of the circuit court that upheld the Findings of Fact, Conclusions of Law, and Decision and Order of the Windward Planning Commission issued on May 12, 2014 and remanded the matter back to the Commission for further proceedings. The ICA Decision vacated the decision based, in part, on the issues identified below:

a. Affect on surrounding properties:

Based on the record in the case, the ICA could not say that the Commission erred in concluding that, even with the proposed traffic mitigation efforts, traffic stemming from the Development would have an adverse effect on surrounding properties. ICA Decision, pgs. 18-23.

b. Burden on public utilities

The ICA stated, “[i]t is unclear how the Planning Commission reached its conclusion that the 4,200 gpd water usage allowance from DWS could only support 70 students...There is simply nothing in the Planning Commission’s Decision and Order or the briefing before this court that explains or supports that calculation...The failure by the Planning Commission to explain its reasoning prevents this court from providing meaningful review.” ICA Decision at pgs. 25-26.

c. Suitability of the land for agricultural uses

The ICA found that the foundational facts are not in dispute. The soil rating is “D” or “poor” which suggests that the Property may be unsuited for agricultural uses. The surrounding areas are not in fact used for agriculture but have become residential in character. The ICA noted, however, that without further explanation the Commission found and concluded that the Property is suitable for agricultural uses, based on representations of Connections. The ICA noted that the representations may have come from the application itself that indicates school will have an agricultural component. ICA Decision pg. 29-30.

d. The General Plan and other Plans

The ICA noted that the Commission found that the general plan designates the

Property for “low density urban use” which includes “residential, with ancillary community and public uses, and neighborhood and convenience-type commercial uses.” The ICA found that “a plain reading of the General Plan does not forbid or even discourage the building of school facilities in low density urban areas. The ICA found that the Commission’s conclusion that the Development is not specifically intended to serve the immediate community surrounding the school and therefore is not consistent with the uses permitted in areas of low density urban use is not supported as there is no additional explanation provided.

110. The LUC finds that the above concerns raised by the ICA have not been adequately responded to or resolved in the Commission’s November 4, 2021 decision.

111. On August 5, 2021, the Commission voted to decide on the record as presented. PC D&O pg. 4, ¶ 20. This raises issues of the reliability of the evidence relied upon for the Commission’s decision.

112. The Traffic Impact Analysis Report was done in 2008. The deliberations by the LUC occurred in January, 2022. The evidence that Connections is asking the LUC to rely upon to make a decision on the Special Permit is 14 years old.

113. A current and accurate assessment of traffic impacts is therefore not contained in the evidence.

114. During testimony taken by the LUC, Anna Kennedy pointed out that there has been development near Kaūmana Drive since the traffic counts were taken. Tr. 1/19/22 pg 50, ll 19-23.

115. Mr. Hong represented that the Applicant has already engaged somebody to update the traffic report because since the Puainako Extension has opened, traffic on Kaūmana Drive has significantly dropped off. Tr. 1/19/22 pg 106, ll 19-24.

116. The Commission approved the Special Permit subject to a requirement that Connections submit anticipated maximum daily water usage. The calculations must include the estimated peak flow in gallons per minute and total estimated maximum potable water demand in gallons per day. PC D&O pg. 8, ¶ 41.

117. The Commission's findings did not address the issue raised by the ICA of how the water needs for the project were calculated. Specifically, it does not point to any evidence to show how 4,200 gallons per day ("gpd") of water would be sufficient to supply the Project with water at full build out. It simply says "[p]otable water needs will be met by connecting to the existing county water supply infrastructure."

118. Connections' expert calculated that the water requirements for the Development's final phase of construction would require between 6,858 and 10,858 gpd. ICA Decision pg. 24.

119. The Commission's decision and the evidence presented fails to state how the potable water needs of the Project, above the maximum available 4,200 gpd from the current county water system, would be provided.

120. During the LUC hearing, Mr. Hong affirmed that the Applicant had made a commitment to the Commission to update the water calculations. Tr. 1/19/22 pg 149, ll 21-22.

121. The Commission found that the classification of soil is "poor" for agricultural use. Despite this limitation, Connections is proposing to maintain the upper portion or nearly one-half of the Property for forestry use and to conduct an agricultural program in conjunction with its curriculum on the lower campus. FOF ¶ 91; PC D&O pg. 16, ¶ 65.E.

122. Neither the Commission nor Connections have attempted to reconcile the incongruence between stating that the soils do not support agricultural activity and while planning to have extensive agricultural activity on the school campus.

123. In its D&O, the Commission did not directly address the issue of why building a school in a low density urban area was contrary to the general plan. Instead, the D&O concentrates on why the Economic, Public Facilities and Land Use elements of the County General Plan require consideration of social and community concerns. PC D&O pg. 16-17, ¶65.G.

124. The County of Hawaii Planning Department's Revised Recommendation explains that the low density urban designation allows ancillary community and public uses. Additionally, the Planning Department ("PD") states that the "General Plan encourages the use of public land for education

and a course of action for South Hilo encourages the establishment of additional schools as the need arises. PD Rec. pg. 11. The Commission's D&O fails to make the same assertion.

125. The Commission has not reconciled the issue raised by the ICA. As an alternative course of action the Commission should consider the use of a district boundary amendment to ensure that the land use is compatible with the surrounding area.

126. The LUC has also identified other areas in which the record or analysis from the Commission failed to satisfy necessary inquiries.

127. According to the Archaeological Field Inspection of Kaūmana Cave included in the 2008 Pacific Legacy Final Environmental Assessment, an:

“inspection was begun at the Kaūmana Caves County Park entrance. A thorough examination was made of the lava tube as it extended makai (down slope) as far as the barred exit at Edita Street. Although a map of the cave extending for half a mile beyond this point was prepared in 1953 by Caceres, Moore and Carroll (Stone 1993:3), at present this lower portion of the tube is no longer accessible, having been sealed off by the construction of Edita Steet. Due to the lack of access, it is impossible to say for certain whether any historic properties exist within this lower section of the cave. However, descriptions of the more makai portions of the tube provided by members of the Hilo Lions Club who explored the cave to a distance of 4,700 feet in 1953 (Halliday 1997) make no mention of any cultural remains”.

128. The collapse of the lava tube during the construction of Edita Street is noted in the Archaeological Field Inspection report dated June 2010 and on pg. 1 of the inspection report, it is reported that a culvert was built to divert flood waters that were exiting the cave to prevent them from crossing Edita Street. It was also reported that residents reported lava tubes in the area were prone to flooding. This active subterranean flooding was attributed to be the reason why the Assessment Survey assumed that any cultural remains or human burials would have been washed away. [PD Background Report 9/28/12- Environmental Assessment- Appendix F pg. 1 paragraph 2 (pdf pg 257)]

129. The field inspection assumes that “the present plan for the property calls for construction to take place only within the makai parcel, east of Edita Street. All construction within this lower parcel is planned to be located well away from the projected extent of the cave (based upon the 1953 map). The more mauka parcel (west of Edita Street) is planned to be set aside as a natural area used only for

educational programs and reforestation projects. The sole structure within this upper parcel would be a raised wooden walkway that would extend the length of the parcel. This walkway would be elevated off the ground, requiring only shallow footings and posts to support it. It would also be located outside a 100-foot buffer around the cave”. [PD Background Report 9/28/12- Environmental Assessment- Appendix F pg. 8 paragraph 2 (pdf pg 260)]

130. The 1953 cave system map by Caceres, Moore and Carroll may not reflect the current subterranean cave system or the extent of the cave system due to the passage of time and extreme weather events that have affected the area and the inability to accurately map underground caves.

131. Connections is a charter school that was represented by a deputy attorney general during these proceedings and is presumed to be an agency of the state.

132. The Property on which the Project is located is owned by the State of Hawaii, by its Department of Land and Natural Resources (“DLNR”). The issuance of a direct lease to Connections was authorized by the Board of Land and Natural Resources (“BLNR”) on January 13, 2011. Commission ROA pdf 985-990.

133. To date Connections has not received a “no-effect” determination or written concurrence from the State Historic Preservation Division (“SHPD”).

134. Connections provided evidence that the BLNR approved the issuance of a direct lease to Connections for school purposes.

135. Connections did not provide evidence that the BLNR provided authorization for Connections to either apply for a Special Permit or that it acknowledged that the owners and their successors and assigns shall be bound by the proposed Special Permit and any conditions attaching to the leased land.

136. The Commission concluded that no traditional or customary native Hawaiian rights have been identified as being exercised on the Property. The Commission’s D&O failed to explain what efforts were made to identify traditional or customary native Hawaiian rights were exercised on the Property.

137. The Environmental Assessment (“EA”) concluded there was no adverse effect to traditional and customary native Hawaiian practices based on a letter that was mailed to 4 agencies or individuals who failed to respond. No follow-up or any other attempts were made. [PD Background Report 9/28/12- Environmental Assessment- Appendix H pg. 1 paragraph 2 (pdf pg 271 Bates stamp 689)]

138. During testimony before the LUC, Mr. Hong, on behalf of Applicant, pointed out that that the EA provided that if any traditional or cultural practices are identified, Connections will make efforts to accommodate continuation of these practices.

139. During his concluding statements before the LUC, Mr. Hong, on behalf of Applicant, additionally argued that he believed he was being treated differentially based on various matters than other counsel who appears before the LUC. He stated “I know my license to practice law is not based on the shape of my eyes, ethnicity, bank account, political party. That’s why when I say something, I know it has to be the truth in the record....I would bet good money that lawyers from big downtown Honolulu firms would not have their integrity questioned in front of their clients and the general public by the commission – you know, the Tesla-driving, Lexus-driving, Infiniti-driving, Waialae Kahala Outrigger club types. I’m sure the LUC lays down the red carpet for them.”

V. LUC CONCLUSIONS OF LAW

1. To the extent that any of the Findings of Fact constitute Conclusions of Law, or Conclusions of Law constitute Findings of Fact, they shall be considered and construed as such.

2. The LUC has jurisdiction over this matter pursuant to section 205-6, HRS, and section 15-15-95 *et seq.* HAR.

3. HRS § 205-6 provides:

- (a) Subject to this section, the county planning commission may permit certain unusual and reasonable uses within agricultural and rural districts other than those for which the district is classified. Any person who desires to use the person's land within an agricultural or rural district other than for an agricultural or rural use, as the case may be, may petition the planning commission of the county within which the person's land is located for permission to use the person's

land in the manner desired. Each county may establish the appropriate fee for processing the special permit petition. Copies of the special permit petition shall be forwarded to the land use commission, the office of planning and sustainable development, and the department of agriculture for their review and comment.

- (b) The planning commission, upon consultation with the central coordinating agency, except in counties where the planning commission is advisory only in which case the central coordinating agency, shall establish by rule or regulation, the time within which the hearing and action on petition for special permit shall occur. The county planning commission shall notify the land use commission and such persons and agencies that may have an interest in the subject matter of the time and place of the hearing.
- (c) The county planning commission may, under such protective restrictions as may be deemed necessary, permit the desired use, but only when the use would promote the effectiveness and objectives of this chapter; provided that a use proposed for designated important agricultural lands shall not conflict with any part of this chapter. A decision in favor of the applicant shall require a majority vote of the total membership of the county planning commission.
- (d) Special permits for land the area of which is greater than fifteen acres or for lands designated as important agricultural lands shall be subject to approval by the land use commission. The land use commission may impose additional restrictions as may be necessary or appropriate in granting the approval, including the adherence to representations made by the applicant.
- (e) A copy of the decision, together with the complete record of the proceeding before the county planning commission on all special permit requests involving a land area greater than fifteen acres or for lands designated as important agricultural lands, shall be transmitted to the land use commission within sixty days after the decision is rendered.

Within forty-five days after receipt of the complete record from the county planning commission, the land use commission shall act to approve, approve with modification, or deny the petition. A denial either by the county planning commission or by the land use commission, or a modification by the land use commission, as the case may be, of the desired use shall be appealable to the circuit court of the circuit in which the land is situated and shall be made pursuant to the Hawaii rules of civil procedure.

- (f) Land uses substantially involving or supporting educational ecotourism, related to the preservation of native Hawaiian endangered, threatened, proposed, and candidate species, that are allowed in an approved habitat conservation plan under section 195D-21 or safe harbor agreement under section 195D-22, which are

not identified as permissible uses within the agricultural district under sections 205-2 and 205-4.5, may be permitted in the agricultural district by special permit under this section, on lands with soils classified by the land study bureau's detailed land classification as overall (master) productivity rating class C, D, E, or U.

4. HAR § 15-15-95(a), (c), and (d) states:

- (a) Any person who desires to use land within an agricultural or rural district for other than a permissible agricultural or rural use may petition the county planning commission of the county within which the land is located for a special permit to use the land in the manner desired; provided that if the person is not the owner or sole owner in fee simple of the land, the record shall include evidence that the person requesting the special permit has written authorization of all fee simple owners to file the petition, which authorization shall also include an acknowledgement that the owners and their successors shall be bound by the special permit and its conditions.
- (c) Certain “unusual and reasonable” uses within agricultural and rural districts other than those for which the district is classified may be permitted. The following guidelines are established in determining an “unusual and reasonable use”:
 - (1) The use shall not be contrary to the objectives sought to be accomplished by chapters 205 and 205A, HRS, and the rules of 15-98 3 3 51 §15-15-95 the commission;
 - (2) The proposed use would not adversely affect surrounding property;
 - (3) The proposed use would not unreasonably burden public agencies to provide roads and streets, sewers, water drainage and school improvements, and police and fire protection;
 - (4) Unusual conditions, trends, and needs have arisen since the district boundaries and rules were established; and
 - (5) The land upon which the proposed use is sought is unsuited for the uses permitted within the district.
- (d) Petitions for issuance of a special permit shall specify the proposed use and state concisely the nature of the petitioner's interest in the subject matter and the reasons for seeking the special permit, and shall include any facts, views, arguments, maps, plans, and relevant data in support of the petition.

5. Section 6E-8, HRS, requires, in part, that:

Before any agency or officer of the State or its political subdivisions commences any project which may affect historic property, aviation artifact, or a burial site, the agency or officer shall advise the department and allow the department an opportunity for review of the effect of the proposed project on historic properties, aviation artifacts, or burial sites, consistent with section 6E-43, especially those listed on the Hawaii register of historic

places. The proposed project shall not be commenced, or if it has already begun, continued, until the department has given its written concurrence.

6. A project is defined as:

any activity directly undertaken by the State or its political subdivisions or supported in whole or in part through appropriations, contracts, grants, loans, or other forms of funding assistance from the State or its political subdivisions *or involving any lease, permit, license, certificate, land use change, or other entitlement for use issued by the State or its political subdivisions.*

Section 6E-2, HRS [emphasis added].

7. Article XI, section 1, of the Hawai‘i State Constitution requires the State to conserve and protect Hawai‘i’s natural beauty and all natural resources, including land, water, air, minerals, and energy sources, and to promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.

8. Article XI, Section 3, of the Hawai‘i State Constitution requires the State to conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency, and assure the availability of agriculturally suitable lands.

9. Article XII, Section 7, of the Hawai‘i Constitution requires the LUC to protect Native Hawaiian traditional and customary rights. The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural, and religious purposes and possessed by ahupua‘a tenants who are descendants of Native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

10. The State and its agencies are obligated to protect the reasonable exercise of customarily and traditionally exercised Native Hawaiian rights to the extent feasible. *Public Access Shoreline Hawai‘i v. Hawai‘i County Planning Commission*, 79 Hawai‘i 425, 903, P.2d 1246, certiorari denied, 517 U.S. 1163, 116 S.Ct. 1559, 134 L.Ed.2d 660 (1996).

11. The LUC is required to preserve and protect customary and traditional rights of Native Hawaiians. *Ka Pa‘akai O Ka‘Aina v. Land Use Commission*, 94 Hawai‘i 31, 7 P.3d 1068 (2000).

12. In order for the LUC to fulfill its constitutional duty to protect Native Hawaiian traditional and customary practices, the LUC has the duty to determine:
- a. The identity and scope of valued cultural, historical, or natural resources in the petition area, including the extent to which traditional and customary Native Hawaiian rights are exercised in the Petition area;
 - b. The extent to which those resources – including traditional and customary Native Hawaiian rights - will be affected or impaired by the proposed action; and
 - c. The feasible action, if any, to be taken by the LUC to reasonably protect Native Hawaiian rights if they are found to exist.

Ka Pa'akai, 94 Hawai'i at 47, P.3d at 1084.

13. The Applicants had the burden of proof in this Special Permit proceeding to show that it met the requirements of § 205-6, HRS, and § 15-15-95, HAR.

14. Upon evaluation of the criteria in § 205-6, HRS, and § 15-15-95, HAR, the record that was received from the Commission, and the testimony elicited during the hearings with the LUC, Applicants have not met their burden.

15. Section 15-15-95, HAR requires the applicant for a special permit to show that the proposed use is “unusual and reasonable” within the agricultural and rural districts.

16. Guidelines are provided to determine an “unusual and reasonable use.” § 15-15-95(c), HAR.

17. The Commission’s May 19, 2014 decision concluded that, even with mitigation, the proposed use would have an adverse affect on surrounding properties by creating noise, traffic, and impacting the quality of life of the adjoining residents.

18. Based on the representation by the Applicants that they are doing a new traffic study because the traffic patterns in the area have changed, there is no basis to find that this guideline has been met.

19. The ICA Decision found that it was unclear how Connections calculated the amount of water needed for its students and how Connections intended to get the full amount of the water it needed for full build out of the school.

20. Although the Applicants represented at the LUC hearing that the water calculations were being updated, and even with the proposed development of sources of water in the future, there is still no certainty that there will be potable water available for full build out of the Development.

21. There remains a question as to whether the Project would unreasonably burden public agencies.

22. The underlying facts regarding whether the land is suited for the use permitted within the district are not controverted. The soil is not conducive to agriculture. Yet, Connections plans to incorporate a large amount of forestry and agriculture within its campus.

23. The Applicant has not clarified which facts are to be applied. If the soil is sufficient to support a forestry and agriculture program on campus, then the land is suitable for agriculture.

24. Because no clarification was provided on this issue, the guideline that the land be unsuited for the uses permitted has not been met.

25. Section 15-15-95(a) requires the Applicants to provide written authorization from the Board of Land and Natural Resources, the fee owner, that included an acknowledgement that the Board and its successors shall be bound by the special permit and its conditions.

26. Applicants provided no such written authorization.

27. Because the Project is being done on state land and because Connections is considered to be a state agency of the State, compliance with § 6E-8, HRS, applies.

28. Section 6E-8, HRS requires more than just an opportunity to review and comment on the Project. This section requires that a project by a state agency receive written concurrence from SHPD.

29. The Applicant has not provided any indication that it has complied with § 6E-8, HRS.

30. The efforts made by the Commission and the Applicant to ascertain whether traditional and customary rights are being practiced on the Property were not sufficient to actually allow the LUC to determine the identity and scope of valued cultural, historical, or natural resources in the Property, including the extent to which traditional and customary Native Hawaiian rights are exercised in the petition area.

31. Without an identification of valued cultural, historical, or natural resources on the Property, the LUC is unable to make further determinations regarding the extent to which those resources will be affected or impaired by the proposed actions and the feasible action, if any, to be taken by the Commission to reasonably protect Native Hawaiian rights if they are found to exist.

32. Based on the current record the LUC is not able to fulfill its duty under *Ka Pa'akai*.

33. There was discussion with the Applicant as to whether a district boundary amendment may have been a better vehicle to get the Project approved rather than a special permit. The decision by the LUC is not being made on the potential preference for a district boundary amendment versus a special permit proceeding.

34. To be clear, this decision is not being made based on the lack of evidence in the record of only one of the required guidelines. As detailed above, there are several of the required guidelines that the LUC finds is lacking.

35. Based on the above and the record that was sent by the Commission to the LUC, the LUC is unable to approve the special permit.

VI. DECISION AND ORDER

The LUC, having duly considered the record transmitted by the Commission, written and oral arguments presented by the Applicant, Hawai'i County, OP, and Intervenor, and a motion having been made and seconded at a virtual meeting on January 20, 2022 held by interactive ZOOM conferencing technology, linking various sites within the State of Hawai'i, and the motion having received the affirmative votes required by section 15-15-13, HAR, and there being good cause for the motion,

HEREBY ORDERS that Hawai'i County Special Permit File No. SP21-413 be DENIED for the following reasons:

1. Based upon the record, the applicant has not provided sufficient information to demonstrate that their proposed project will not harm traditional and customary practices exercised by Native Hawaiians and therefore the LUC cannot fulfill its constitutional obligation to preserve and protect rights, customarily and traditionally exercised by Native Hawaiians as required under Art. XII, Sec 7 of

the Hawaii State Constitution, especially in light of the proximity of the proposed project to Kaūmana Cave. The applicant concluded that there is no evidence of traditional cultural properties or practices within that project area based upon the 2010 EA, however, the Commission's Decision lacks any factual findings sufficient to support this conclusion as required by the Court in *Ka Pa'akai*.

2. Based upon the record and representations of the Applicant, the applicant has not met one of the criteria set forth in chapter 205 and specifically HAR §15-15-95(c)(2), specifically, "the desired use would not adversely affect surrounding property." The ICA in its Decision concluded that there was support for the Commission's conclusion that, even with the proposed traffic mitigation efforts, traffic stemming from the Development would have an adverse effect on surrounding properties. The actual effect of the traffic on the surrounding areas is further called into question because the Applicant has already committed to doing a new traffic study due to the opening of the Puainako Extension which has affected traffic in the area. This admission does not allow the LUC to make a determination as to whether the traffic from the Project will adversely affect the surrounding properties.

3. Based upon the record, the applicant failed to meet to meet the criteria of HAR§ 15-15-95 (a) specifically, "if the person is not the owner or sole owner in fee simple of the land, the record shall include evidence that the person requesting the special permit has written authorization of all fee simple owners to file the petition, which authorization shall also include an acknowledgement that the owners and their successors shall be bound by the special permit and its condition. The Commission's FOF, COL and proposed recommendations lacks any factual findings sufficient to support this and the record does not contain any information .

4. Based on the Commission's November 4, 2021 Decision and the record in this case, the Applicant has not met the requirements of § 6E-8, HRS, by providing a written concurrence from SHPD for the Project.

5. Based upon the record and representations of the Applicant at the LUC hearings, the applicant has not provided sufficient information to demonstrate that their proposed project has adequately addressed water usage concerns raised in the ICA Decision, which found that the water

requirements calculations were not supported in the record. Further, the Applicant confirmed that they had committed to having the water calculations redone. The record also failed to show other sources of water that would be developed to support the full build out of the Project.

6. The LUC determined that the Project did not constitute a use that would promote the effectiveness and objectives of chapter 205, HRS, and complies with section 205-6(c), HRS. The term “unusual and reasonable” implies that the use itself is both unusual in the larger context of Chapter 205 and that it is reasonable to allow that use in the agricultural district. The Commission found that while a school would be “unusual” in the agricultural district, it is “usual” in the urban district. Therefore, it is not “reasonable” in the agricultural district.

The Commission, through its proceedings, clearly identified the uses such as rock quarries and waste dumps, which are not “usual” in either the urban or agricultural district as being “unusual” uses and appropriate for a Special Permit. Schools, as they are “usual” in the urban district do not fall into this category.

Based upon the record of the proceedings before the Planning Commission, and pursuant to section 205-6, HRS and section 15-15-95 *et seq.*, HAR, the LUC found that the recommendation of the Planning Commission to approve a State Special Permit for the Petition Area, consisting of approximately 70.15 acres of land in the State Land Use Agricultural District identified by Hawai‘i Tax Map Key No. (3) 2-5-006:141 in Kaūmana, South Hilo, Hawai‘i, while it may be an “unusual and reasonable use”, it “would not promote the effectiveness and objectives” of chapter 205, HRS, within the State Land Use Agricultural District. The proposed use is permanent and includes a clearly urban development which includes a school, gymnasium, dormitories, cafeteria, other housing/administration buildings and parking.

Chapter 205 HRS sets forth distinct districts where identified uses are allowed. The intent of Chapter 205 is to retain distinct boundaries that separate urban and rural from agricultural uses and to preserve conservation lands. Allowing urban uses in agricultural districts runs contrary to the intent of Chapter 205.

Chapter 205 recognizes that there are uses that may not fall within the agricultural category and that are not appropriate in the urban district. As set forth herein, a school is not an unusual use. Allowing a school in the agricultural district under a Special Permit would therefore run contrary to the objectives sought to be accomplished by Chapter 205 HRS.

The LUC determined that the special permit application was contrary to HRS§ 205-6, and HAR §15-15-95.